United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,344

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LARRY C. CLEMONS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
EDWARD T. MILLER,
Assistant United States Attorneys.

Cr. No. 1089-65

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Did appellant by presenting evidence in his own behalf waive his right to challenge the sufficiency of the government's evidence at the end of its case in chief? If not, was the evidence sufficient to withstand his motion for judgment of acquittal where there was testimony which established that the car involved was stolen in Maryland and testimony by two police officers that they had opportunities to observe that appellant was the driver of the car and that one had caught him and arrested him after appellant had bolted from the driver's seat of the car and after a short chase during which the officer had never lost sight of his quarry?

2) Did the trial judge err by preventing appellant from calling a witness before the jury when, after inquiry outside the presence of the jury, he ascertained that the witness would properly invoke his privilege against self-incrimination and when appellant's purpose in calling the witness was to identify the witness, by inference derived from his privileged silence, as the culprit for whom appellant had allegedly been mistaken?

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The instant appeal involves challenges to the sufficiency of the evidence identifying appellant as the driver of a stolen car and the refusal of the trial judge to permit appellant to call before the jury a witness whom he identified as the actual offender and who would claim his privilege against self-incrimination. This precis of the record, therefore, is focused primarily on the facts which develop those issues.

Appellant Larry C. Clemons was convicted on January 6, 1966, the fourth day of his trial to a jury before Judge

Spottswood W. Robinson, III, on one of the two counts of an indictment filed September 27, 1965. He was convicted on the second count, charging him with unauthorized use of a motor vehicle (22 D.C. Code § 2204), but acquitted of the first count, charging him with interstate transportation of a stolen motor vehicle (18 U.S.C. § 2312), and sentenced under the Federal Youth Corrections Act pursuant to 18 U.S.C. § 5010(b). This appeal followed.

The Government's Case

The record shows that Privates Lawrence L. Dorsey and Henry Spencer, assigned to Scout car #93, and stopped at 15th and H Streets, Northeast, at 1:25 a.m. on July 31, 1965, began a high speed chase after a speeding red Chevrolet bearing Maryland tags (Tr. 37-39, 105). At 12th and H Streets, the Chevrolet slowed almost to a stop, and the scout car pulled to within less than ten feet behind it (Tr. 42, 65). As the driver turned around to look behind him, both officers got a look at his face. It was a well lighted part of H Street and Officer Dorsey testified he "could see him quite clearly." (Tr. 42-43, 48-49, 63, 107, 110-11).

The high speed chase continued to 12th and Constitution Avenue, where the Chevrolet suddenly skidded to a stop at an angle to the curb with the scout car still fifty to eighty feet behind (Tr. 44, 67, 147). The individual in the passenger seat jumped from the passenger side, ran south on 12th Street, and disappeared without Spencer's getting a look at his face (Tr. 45, 109, 150). The driver, on the other hand, fled from the driver's seat and ran in an opposite, northeasterly direction toward 1208 Constitution Avenue, with Officer Dorsey, who had jumped almost simultaneously from the scout car even before it stopped, in hot pursuit and only sixty to ninety feet behind (Tr. 45, 148-49). Officer Spencer, occupied with stopping the scout car, did not see the driver's face when the occupants fled, but he nevertheless testified that the person who ran from the driver's side of the car appeared to be

the driver he had seen look back at 12th and H Streets and that the person Officer Dorsey brought back a minute later was definitely that person (Tr. 110-11, 148-49). Officer Dorsey, on the other hand, got a much better look in the light which was sufficiently good that even the scout car's highlights were not really helpful (Tr. 46). Officer Dorsey repeatedly testified that he never lost sight of appellant as he chased him to 1208 Constitution Avenue where the arrest was made possible when appellant was slowed by an iron picket fence (Tr. 46-49, 72-73, 76, 401). There was no doubt whatever in Dorsey's mind that he had the right man (Tr. 51, 72-73, 76). Both officers identified appellant in court (Tr. 49, 111).

The other evidence in the government's case, besides proof that the car was stolen in Maryland, consisted of a scrap of paper recovered from the floor of the passenger's side of the vehicle which had appellant's nickname, Georgia Avenue address, and telephone number on it (Tr. 22-25, 34-35, 88-91), and the testimony of a lady from whom the Maryland license plates on the car had been stolen the previous day (Tr. 176). Appellant's motion for judgment of acquittal on the grounds of inadequate identification was denied (Tr. 184-86).

The Defense

Appellant took the stand. The gist of his defense was that he "had no connection whatsoever with the automobile in question." He said he was merely relieving himself on a dark back porch out of public view when the officer arrested him, instead of his good friend Taylor, who had been wearing a white T-shirt similar to his own when he raced past appellant shortly after the screech of tire nearby at the time in question (Tr. 189-90, 198-205, 251-52). On cross-examination he described Taylor as having lighter brown skin than himself and being the same size but of lighter build (Tr. 282-83). He also explained that he had given the scrap of paper which bore his nickname, address and phone number and which was in his

own handwriting to Taylor the day before (Tr. 205-06). And he testified on cross-examination that Taylor had showed him the red Chevrolet the previous evening and he also called a witness who placed a similar car in Taylor's possession about a day before appellant's arrest (Tr. 232-33, 310). He admitted, however, that he had not mentioned Taylor to Officer Dorsey when he was arrested or to anyone but his lawyer, for that matter, until he took the witness stand (Tr. 207).

The Attempt To Call the Privileged Witness

When appellant sought to "produce [as his last witness the William Taylor whom he alleged had run past him] and to ask him his name and no further questions," his originally stated purpose was to avoid the adverse effect of being charged with a missing witness (Tr. 190-192). The trial court, however, apparently would not have permitted such an argument, but nevertheless obtained an assurance that the prosecutor would abstain from such an argument (Tr. 192, 267). Overnight, however, appellant decided to call Taylor as a hostile witness, presumably to adduce affirmative proof in support of his defense of misidentification (Tr. 266). After careful exploration by the court with counsel, including counsel appointed to assist Taylor, all were apparently satisfied that Taylor would in fact assert his privilege against self-incrimination (Tr. 260, 265-71). The court therefore ruled without objection, that Taylor, having properly invoked his privilege, would not be permitted to testify before the jury (Tr. 269). Whereupon, defense counsel stated with appellant's concurrence that he saw no reason to call Taylor and considered the matter ended (Tr. 269-70, 272). A final motion for judgment of acquittal was subsequently denied (Tr. 403-04).

SUMMARY OF ARGUMENT

I

By offering evidence in his own behalf, appellant waived his motion for judgment of acquittal. But in any event, there was ample evidence to withstand the motion. Two officers testified they saw the driver's face while he was driving the stolen car they were pursuing when he slowed nearly to a stop and looked back when they were just behind him. Both officers said this driver was appellant. One officer testified that he had chased the driver, who was appellant, until he caught him, had never lost sight of him, and was positive of his identification. There was also apropriate evidence establishing that the car was stolen and that it bore stolen license plates. The issue, therefore, was solely one of credibility, and was properly left to the jury.

II

Appellant, knowing that the witness Taylor would invoke his privilege against self-incrimination, had no right to call him before the jury so that Taylor could be identified by impermissible inference as the culprit for whom appellant had allegedly been mistaken by the pursuing police officer. To have permitted appellant to do so would have permitted him in effect to offer evidence, by inference, without the safeguard of cross-examination. The law is clear that prosecutors may not engage in such conduct without running the risk of committing reversible error. The rationale for the rule is similarly applicable to other parties so that the rule is that when a witness declines to answer a question on the ground that his answer would tend to incriminate him, that refusal alone cannot be made the basis of any inference by the jury, either favorable to the prosecution or favorable to the defendant. In the instant case, to avoid the possibility that such an improper inference might be taken, the judge inquired regarding the witness's intentions, out of the presence of the jury, and when he was satisfied that proper invocation would

be made refused without objection to permit the witness to take the stand before the jury. This was the only fair way of handling the problem since the government would have been without practical recourse or protection had the witness come before the jury for the purpose appellant intended.

ARGUMENT

I. Appellant's motion for judgment of acquittal at the close of the prosecution's case in chief was properly denied.

(Tr. 24-25, 39, 42-49, 51, 63, 65, 67, 82, 88-91, 107-11, 147, 150, 176, 181-85, 401, 419, 422.)

Insufficient identification to make a jury question is the focus of appellant's contention that his motion for judgment of acquittal was improperly denied. (Brief of Appellant, p. 12).[1] The facts relating to the theft of the auto and the chase prior to the arrest were not seriously disputed (Tr. 24-25, 39, 42-44, 88-91, 108, 147, 150, 176). They were surely adequate to reach the jury. In appellee's opinion however, there was also ample evidence identifying appellant as the offender to reach the jury, especially if viewed, as it must be, in the light most favorable to the government. *Cooper* v. *United States*, 94 U.S. App. D.C. 343, 218 F.2d 39 (1954); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947). But appellant is precluded from raising this issue even without consideration of its doubtful merits because by adducing evidence on his own behalf after his motion was denied he may be said to have waived any right to contest the propriety of the motion on this appeal. See *Cephus* v. *United States*, 117 U.S. App. D.C. 15, 17-18, notes 4, 13, 14, 324 F.2d 893, 895-96, notes 4, 13, 14 (1963).

Even a bare outline of the strong and detailed evidence adduced during the government's case in chief, however,

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[1] Trial counsel regarded this as the primary issue as well (Tr. 181-85, 419, 422).

refutes appellant's contention of insufficiency. Officers Dorsey and Spencer both testified that during the chase, while apellant's car was nearly stopped on a well lighted part of H Street and in line with the scout car's headlights, and when their car was not more than ten feet from appellant's car, appellant, who was the driver, turned to look behind him and both officers got a good view of his face (Tr. 39, 42-43, 63, 65, 82, 107). When appellant abandoned the car from the driver's side and fled up 12th Street with Officer Dorsey in hot pursuit, he never got out of Dorsey's sight (Tr. 44-49, 51, 67, 109, 147, 150, 401). That chase lasted only about a minute, it started in good light, and Dorsey was absolutely positive of his identification (Tr. 45-46, 51, 110-11, 401). Officer Spencer was also sure the man Dorsey captured was the driver who looked back at them at 12th and H (Tr. 107, 110-11).

The real issue, therefore, was the credibility of the police officers whose testimony identified appellant as the driver of the stolen car. The responsibility for resolving questions of credibility was, of course, solely the jury's.[2] See *Trimble* v. *United States*, No. 19,942, D. C. Cir., September 15, 1966.

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[2] Even had the witnesses' testimony been "implausible, unreliable, or incredible," which, in appellee's opinion, it clearly was not, it remained solely a jury question. *Young* v. *United States*, 114 U.S. App. D.C. 42, 43, 309 F.2d 662, 663 (1962); *Wigfall* v. *United States*, 97 U.S. App. D.C. 252, 230 F.2d 220 (1956); *Billeci* v. *United States*, 87 U.S. App. D.C. 274, 184 F.2d 394 (1950). Indeed, Officer Dorsey's testimony alone, without Officer Spencer's testimony and other corroboration, would have been sufficient to reach the jury. See *Jones* v. *United States*, —— U.S. App. D.C. ——, 361 F.2d 537 (1966); *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951). *A fortiori* appellant's contention that the government's evidence was insufficient to reach the jury is without merit.

II. The trial judge properly refused to permit appellant to call a witness before the jury whom he knew would invoke his privilege against self-incrimination.

(Tr. 48, 189-92, 266-70, 443-44.)

The original stated reason why defense counsel sought to produce William Taylor at trial was to avoid the adverse inference if he were a "missing witness" (Tr. 189-92, 266-70).[3] The trial court, having satisfied itself after careful inquiry that Taylor would properly invoke his privilege against self-incrimination, advised counsel that because of that fact he would not permit Taylor to take the stand before the jury. In addition, he obtained assurance from the prosecutor that he would abstain from a "missing witness" argument (Tr. 267, 269-70). See *Morrison* v. *United States*, No. 19,325, D.C. Cir., July 13, 1966.

Appellant made no objection to the ruling at the time, but now contends that the court's ruling was erroneous "in that it wrongfully deprived appellant of a substantial element of his case."[4] (Brief for Appellant, p. 25.) However, absent explicit objection, this Court is not obliged to consider this new contention at all. *On Lee* v. *United States*, 343 U.S. 747, 749-50 n. 3 (1952); *Trimble* v. *United States, supra; United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965) *(en banc), cert. denied*, 383 U.S. 907 (1966).

In any event, his purpose in calling the witness is improper because once he knew the witness would exercise his privilege, that purpose, in effect, was to adduce

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[3] Appellant's defense, as noted above, was that a mistake in identification resulted in his arrest and he implied that his friend Taylor was the driver of the stolen car who had been chased by Officer Dorsey (Tr. 190-91).

[4] In his brief appellant asserts that he should have been permitted to call Taylor to show "there was in fact a William Taylor" and to give "the jury the opportunity . . . to measure for themselves the possibilities of mistaken identification" (Brief for Appellant, pp. 25-26).

evidence, by inference, which might be very valuable to his case, but in a form not subject to cross-examination. See *Douglas* v. *Alabama*, 380 U.S. 415, 420 (1965); *Namet* v. *United States*, 373 U.S. 179, 187 (1963); *Fletcher* v. *United States*, 118 U.S. App. D.C. 137, 139, 332 F.2d 724, 726 (1965).[5] The rationale proscribing such techniques is equally applicable to all parties in litigation.[6] The rule which governs the situation with which the trial judge was faced is stated in *Billeci* v. *United States*, 87 U.S. App. D.C. 274, 278, 184 F.2d 394, 398 (1950):

> We think that the correct rule is that when a witness declines to answer a question on the ground that his answer would tend to incriminate him, that refusal alone cannot be made the basis of any inference by the jury, either favorable to the prosecution or favorable to the defendant. The witness in such an incident is exercising a constitutional right personal to himself. That exercise, without more, should not be to the harm of someone else. His answer, if given, might conceivably be that he but not the defendant was guilty of the offense, or it might be that both he

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[5] Another theory which renders such questioning improper conceives of such questioning as a form of prosecutorial misconduct when the government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege. See *Namet* v. *United States*, *supra* at 186. It is perfectly clear that it would be improper for defense counsel to do the same. See *United States* v. *Dardi*, 330 F.2d 316, 335-36 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964); *Coile* v. *United States*, 100 F.2d 806 (5th Cir. 1939).

[6] The rationale as enunciated, for instance, by Judge Learned Hand in *United States* v. *Maloney*, 262 F.2d 535, 537 (2d Cir. 1959) would not appear to have application solely to prosecutors:

> [R]efusals [to answer questions on the grounds of the privilege against self-incrimination] have uniformly been held not to be a permissible basis for inferring what would have been the answer, though logically they are very persuasive. . . [B]ut it is clear, not only that the presumed [affirmative] answer has not the sanction of oath, but—what is even more important—that the accused cannot cross-examine. If they once do get before the jury, there arises, as we have said, a strong probability that they will be taken as evidentiary.

> and the defendant were guilty; or it might relate entirely to some other offense.

Cf. Morrison v. *United States*, *supra* at slip opinion pp. 5-6. Moreover, case law as well as simple logic support appellee's position that the rule governs any party calling a witness who knows the witness will invoke his privilege and constrains that party even from putting the witness on the stand where an inference may be taken and cross-examination is precluded.[7]

It is obvious that if appellant were once permitted to call Taylor before the jury, when he knew that Taylor would invoke his privilege, the damage would be done. He could with impunity falsely have identified Taylor as the real culprit, while the government would have been utterly helpless to challenge his assertion and inquire after the truth by the time honored method of cross-examination. Under such circumstances, it would hardly have been fair for the judge to permit the jury to make the inference from a witness's apparent tacit admission of guilt, when further inquiry would be precluded, and the inference from his mere presence would doubtlessly be permanently fixed in the minds of the jury, irrespective of any subsequent motion to strike when cross-examination had proved impossible. The trial judge's ruling, therefore, was the only fair one possible under the circumstances.[8]

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[7] The pertinent language stated in *United States* v. *Five Cases, etc.*, 179 F.2d 519, 523 (1950), approved in *United States* v. *Maloney*, *supra* at 537-38, and *United States* v. *Hiss*, 185 F.2d 822, 832 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951) is:

> Nevertheless we are not prepared to say that it would not be ground for reversal if the *party* who called a witness connected with a challenged transaction knew, or had reasonable cause to know, *before putting the witness on the stand* that he would claim his privilege. (Italics supplied.)

[8] Appellee does not share appellant's conviction that the prosecutor's argument that "there is no indication here that Taylor looked like the defendant" is indistinguishable from the prosecutor's arguing "missing witness." (Tr. 443.) Appellant's own testimony certainly did not convincingly establish their similarity (Tr. 48). There is no other testimony in the record describing Taylor's looks.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
EDWARD T. MILLER,
Assistant United States Attorneys.

Furthermore, in making his comment, the prosecutor was obviously not commenting on appellant's failure to call Taylor, in particular, nor speculating as to what his testimony would be. There was, therefore, no missing witness issue at all. See *Pennewell* v. *United States*, 122 U.S. App. D.C. 332, 353 F.2d 870 (1965). In fact, appellee submits, the prosecutor was merely describing the state of the record and meeting the central contention of appellant's defense: that appellant looked so much like Taylor that the police officer in hot pursuit mistook him for Taylor (Tr. 444). Thus, is not appellant really suggesting that his defense should have been immune from frontal attack, even though he surely could have brought other witnesses to testify that he looked like Taylor, if in fact there was any substance to this defense?

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BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,344

LARRY C. CLEMONS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM VERDICT AND JUDGMENT IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Edward M. Shea
Attorney for Appellant
(By appointment of this court)

RAGAN & MASON
900 - 17th Street, N.W.
Washington, D.C.

August 31, 1966

STATEMENT OF QUESTIONS

The questions presented are:

1. Whether, in a trial upon an indictment for unauthorized use of a motor vehicle, the trial court should have granted appellant's motion for acquittal after the close of the Government's case on the basis that certain identification evidence was inherently incredible, and, when such identification evidence was discounted, the inference of innocence was equal to the inference of guilt.

2. Whether the trial court erred in failing to allow the defense to call one William Taylor for identification purposes, as the man whom the defense alleged was the actual perpetrator of the crime, on the basis of Taylor's right against self-incrimination. Whether that error was compounded by the trial court's allowing, over objection, the prosecutor to argue in his summation no evidence of similarity in complexion and stature between appellant and Taylor after the prosecutor had represented he would not argue the issue of a missing witness in reference to Taylor.

LARRY C. CLEMONS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

INDEX AND TABLE OF CASES

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TABLE OF CASES

* Cases marked with asterisks are those chiefly relied on.

JURISDICTIONAL STATEMENT

This is an appeal from a verdict of guilty and from judgment thereon. Appellant was convicted of the crime of unauthorized use of a motor vehicle, Title 22, D.C. Code Section 2204.

The lower court had jurisdiction by virtue of Title 11, Section 305 of the D.C. Code. This court's jurisdiction is claimed under Title 28, Section 1291 of the U.S. Code.

STATEMENT OF THE CASE

PROCEDURAL BACKGROUND

On September 27, 1965, Larry C. Clemons, appellant herein, was indicted in this jurisdiction and charged with interstate transportation of a stolen motor vehicle in violation of Title 18, Section 2312 of the U.S. Code, and unauthorized use of a motor vehicle in violation of Title 22, D.C. Code, Section 2204. Appellant pleaded not guilty upon arraignment on October 15, 1965, and George A. Fisher, Esquire, was appointed counsel for appellant on November 4, 1965.

Trial commenced on January 3, 1966, before the Honorable Spottswood W. Robinson III. After the Government closed its case, counsel for appellant moved for a judgment of acquittal (Tr. 181), which was denied (Tr. 187).

Thereafter, on January 6, 1966, the jury found appellant not guilty of the first count, interstate transportation of a stolen automobile; but found appellant guilty of the second count, unauthorized use of a motor vehicle (Tr. 477).

After sentencing on February 4, 1966, pursuant to the Federal Youth Correction Act, Title 18, Section 5010(c) of the U.S. Code (Tr. 526), and after certain procedural aspects relating to prosecution of appeal irrelevant here, Judge Robinson denied as frivolous appellant's application for leave to appeal in forma pauperis on May 5, 1966.

On June 21, 1966, this court granted appellant's petition to prosecute his direct appeal without prepayment of costs, and appointed appellant's current counsel to represent appellant. On July 25, 1966, this court granted appellant's application for release on personal recognizance pending appeal.

THE FACTS

At about 1:25 a.m., on July 31, 1965, Officers Dorsey and Spencer of the Metropolitan Police Department were parked in a scout car at the southeast corner of 15th and H Streets, Northeast, in the District of Columbia (Tr. 38), when they first observed and then pursued a red Chevrolet heading west on H Street at an extremely high rate of speed (Tr. 39).

The car was going anywhere from 40 to 50 miles an hour (Tr. 39). At the corner of 12th and H Streets, the Chevrolet slowed down, turned left on 12th Street, and then accelerated to an extremely high rate of speed (Tr. 43). During that portion of the chase, the scout car reached speeds from 50 to 70 miles an hour (Tr. 43), with the Chevrolet gaining on the scout car (Tr. 108).

At the corner of 12th and Constitution Avenue, the Chevrolet abruptly halted; and the two persons in the Chevrolet jumped from it and fled (Tr. 44, 45).

The scout car then pulled alongside the Chevrolet, and Officer Dorsey, who had been driving, jumped from the driver's seat while the scout car was

still moving, leaving Officer Spencer to stop the scout car (Tr. 45). Officer Dorsey then gave chase in the direction in which one of the occupants of the Chevrolet had fled (Tr. 46). The chase took a diagonal direction across the street and away from the corner where the automobiles were (Tr. 69), and up the 1200 block of Constitution Avenue, over a fence and into a yard at 1208 Constitution Avenue (Tr. 46). At that point, Officer Dorsey ran to appellant and told him he was under arrest (Tr. 47). Appellant at that time, and since, consistently maintained his innocence.

STATEMENT OF POINTS

The points relied upon by appellant are:

1. That appellant's motion for summary judgment at the end of the Government's case should have been granted because, after identification evidence that was inherently incredible should have been discounted, the evidence put forth by the Government was equally consistent with innocence as with guilt.

2. That the trial court erred in failing to allow the defense to call one William Taylor for

identification purposes, as the man whom the defense alleged was the actual perpetrator of the crime, on the basis of Taylor's claim against self-incrimination. This error was compounded by the trial court's allowing, over objection, the prosecutor to argue in his summation no evidence of similarities in complexion and stature between appellant and Taylor after the prosecutor had represented he would not argue the issue of a missing witness in reference to Taylor.

STATUTES INVOLVED

District of Columbia Code:
§22-2204. Unauthorized use of vehicles.

> "Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment. (Mar. 3, 1901, ch. 854, §826b, as added Feb. 3, 1913, 37 Stat. 656, ch. 23, §1.)"

United States Code, Title 18:
§2312. Transportation of stolen vehicles.

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c.645, 62 Stat. 806."

SUMMARY OF ARGUMENT

I.

Excluding the police officer's visual identification of appellant, there would have been insufficient evidence adduced by the Government to go to the jury. This is so because the other evidence (testimony that the automobile and license plates had been stolen; a piece of paper with appellant's nickname and telephone number on it; and testimony that appellant was apprehended near where the automobile had been abandoned and where one of the occupants of the automobile had fled) would have been equally inconsistent with appellant's being a passenger in the automobile as his being the driver. Accordingly, if the identification testimony of the police officers had been rejected, a judgment of acquittal would have had to have been entered.

Testimony which is inherently incredible is no evidence at all. Testimony by the police officers that they were able to see appellant's face well enough under the circumstances to thereafter identify his face as the face of the driver of the automobile was inherently incredible. Those circumstances constituted viewing out of one moving

automobile into another moving automobile in the middle of the night during a chase and during a process of the turning of the chased automobile while the colored-roof light of the pursuing automobile was rotating.

II.

Appellant's trial counsel sought to put one William Taylor on the stand as his witness. Appellant's defense was to be based substantially on the suggestion that it was Taylor who had actually stolen and driven the automobile. Taylor, through appointed counsel, indicated his intention to invoke his privilege against self-incrimination. The trial court then ruled that Taylor would be allowed to take the stand only in the absence of the jury, to invoke his privilege, and, if the privilege were properly invoked, Taylor would not take the stand before the jury.

The trial court's ruling was erroneous since Taylor had no right, as a witness, not to take the stand and the trial court had no discretion to give him that right to the prejudice of appellant's case. The erroneous ruling was prejudicial to appellate's case in that it denied appellant, if nothing else, the opportunity to show the jury that Taylor was not a figment of appellant's imagination and that appellant did not fear Taylor's appearance in open court. Further, the jury would have had an opportunity to compare, in light of the police officer's nighttime identification, the physical characteristics of Taylor and appellant.

The prejudice caused by the ruling was further compounded by the prosecuting attorney's arguing that there was no evidence of similarity of physical appearance between Taylor and appellant, after the prosecuting attorney had represented that he would not argue the issue of a missing witness in regard to Taylor.

ARGUMENT

I.

IT WAS ERROR ON THE PART OF THE TRIAL COURT TO FAIL TO GRANT MOTION FOR ACQUITTAL AFTER THE CLOSE OF THE GOVERNMENT'S CASE WHERE, AFTER CERTAIN INHERENTLY INCREDIBLE EVIDENCE SHOULD HAVE BEEN EXCLUDED, THE INFERENCE OF INNOCENCE WAS EQUAL TO THE INFERENCE OF GUILT

With respect to Point I, appellant desires the Court to read the following pages of the reporter's transcript: 38-51; 61-76; 105-111; 140-149, all inclusive.

At the close of the Government's case, appellant moved for acquittal. This court has said concerning the standards of acquittal:

> ". . .if a judge is of opinion that upon the evidence a reasonable mind could not find guilt beyond a reasonable doubt, he must not let the jury act, because to do so would be to let it speculate without evidence adequate in law." Cooper v. United States, 94 U.S. App. D.C. 343, 218 F.2d 39, at 41 (1954).

The court and the jury at the time of the motion for acquittal could consider only the Government's case. Appellant had not indicated, even by an opening statement, what the defense would be.

The Government's case consisted of:

(1) Testimony that the red Chevrolet had been stolen in Maryland;

(2) Testimony that the license plates thereon had been stolen in Maryland;

(3) A piece of paper with appellant's nickname and telephone number on it found in the automobile;

(4) Testimony that appellant was apprehended near where the stolen automobile had been abandoned and nearer yet where one of the occupants of the car had fled;

(5) Testimony of Officers Dorsey and Spencer that by face-sight identification during the course of an automobile chase in the middle of the night appellant was the driver; and

(6) Testimony of Officer Dorsey that he continually had the hulk which jumped from the driver's seat in his line of vision until he apprehended that hulk; and that hulk turned out to be appellant.

We submit that the elements of proof (1) through (4) above are as consistent with innocence as with guilt.

Putting aside for the moment elements of proof (5) and (6) above, the court and the jury, on the basis of elements (1) through (4), could have reasonably drawn two conclusions; appellant either was or was not in the car.

Even if the latter conclusion were drawn, that conclusion would equally be consistent with innocence as with guilt for, by reference to elements (1) through (4), appellant could equally as well have been the passenger in the car as the driver; and, under the rule of Cooper, the jury could not have been allowed to speculate which.

If appellant had been the passenger, the Government clearly would not have made its case.1/

We urge, then, that it would have been the duty of the trial court to enter a verdict of acquittal if evidentiary items (1) through (4) of the Government's case were the sum and substance of the proof to be considered. However, they were not because the trial court ruled that the identifications by the police officers could be considered by the jury.

1/ Kemp v. United States, 114 U.S. App. D.C. 88, 311 F.2d 774 (1962); Stevens v. United States, 115 U.S. App. D.C. 332, 319 F.2d 733 (1963).

. . . .

Where testimony, though uncontradicted, is inconsistent with physical laws or clashes with basic human experience, it is to be rejected as being no evidence at all.[2/] In an appeal where the issues involved visibility in automobiles, the Fifth Circuit reversed a jury verdict in a civil action, stating:

> "Courts are not required to believe testimony which is inherently incredible or which is contrary to the laws of nature and of human experience, or which they judicially know to be unbelievable." Geigy Chemical Corporation, v. Allen, 224 F.2d 110 at 114, 5th Cir., 1955.

Police officers enjoy no higher standing than other witnesses regarding inquiry into whether their testimony is inherently incredible.

> "In some cases police testimony, like other testimony, will simply be too weak and too incredible, under the circumstances, to accept." Jackson v. United States, ____U.S. App. D.C._____, 353 F.2d 862 at 867 (1965).

2/ "Testimony which is at variance with physical facts is no evidence." Southern Pacific Company v. Matthews, 335 F.2d 924, 5 Cir. 1964, at 927.

Jackson further teaches us that the fact that Officer Dorsey's and Officer Spencer's testimony were mutually corroborative by no means forecloses inquiry as to whether they were mutually incredible.

There follows a discussion of the testimony of Officers Dorsey and Spencer. However, appellant urges that a reading of the testimony is necessary to obtain the full flavor of the steadfast insistence upon the conclusions with little or no attempt to rationalize the physical factors and inconsistencies militating against those conclusions.

Officer Dorsey first testified (Tr. 39) that he was parked on the southeast corner of 15th and H Streets, Northeast, near Benning Road, when he observed a Chevrolet coming down Benning Road in a westernly direction at an extremely high rate of speed. Within five sentences of his testimony, he has pulled up to within two - five - ten feet.

After Officer Dorsey's testimony had been slowed down by the prosecutor, Officer Dorsey testified at Tr. 42 that he was pulled up behind the vehicle at 12th and H Streets, that he had his red light on, that his siren had been going for a half a block, and that the chased vehicle had pulled over to the northeast corner of 12th and H Streets.

At page 43, he testified that the driver turned around to see exactly who it was. Officer Dorsey there testified that at a distance of 5 to 10 feet he was able to see the driver "quite clearly". He does not rely on a spotlight or any other special light, stating that "H Street is well lighted".

Then the chase resumed down 12th Street.

At 12th and Constitution, the chased automobile was abruptly abandoned. At Tr. 44, Officer Dorsey stated that at the point of time of abandonment, the scout car was 50 to 70 yards away. At Tr. 45, Officer Dorsey testified that at the point in time when he left the scout car to begin the foot chase, he was 60 to 90 feet away from the person he was chasing. At Tr. 46, Officer Dorsey again relies on the normal lighting of the night, saying he "didn't need" his headlights what with the lighting at 12th and Constitution.

Upon cross examination, at Tr. 63, Officer Dorsey guesses there were shadows, but insists he could still see a face. He then shifts his reliance for light at 12th and H Streets on his headlight beams rather than the street lighting. He indicates that the beams were on low beam but relies upon light reflections into the back window.

At Tr. 65, Officer Dorsey then states that his headlight beams were shining into the Chevrolet at a distance of 5 to 10 feet rather than reflecting on the rear of the automobile.

At Tr. 67, the distance at the point of time when the occupants of the chased automobile abandoned shrinks from 50 to 70 yards as it was at Tr. 44, to 50 to 80 feet.

Officer Spencer first testified at Tr. 110 that the person he saw abandon the automobile from the driver's side was the same person whose face he saw at 12th and H Streets. Then, at Tr. 111, he stated that the person whom Officer Dorsey brought back to the automobile "appeared to be" the same person who ran from the automobile; but, in any event, that appellant, as he sat in the courtroom, had the same face as the one he saw at 12th and H Streets.

Upon cross-examination at Tr. 142, Officer Spencer answers "No, Sir" to the question, "Could you see into the car?" At Tr. 143, Officer Spencer says that the reason the automobile slowed down at the intersection of 12th and H Streets was that it was going from a lower gear to a higher gear. At Tr. 145, Officer Spencer would give no estimation of the distance between the two automobiles at 12th and H Streets.

At Tr. 145, Officer Spencer states that the sight identification took place after the turn at the intersection about three car lengths into H Street. This, is, of course, completely contradictory to Officer Dorsey's testimony that the face-sight identification took place at the northeast corner of 12th and H Streets before the turn into 12th Street was made.

At Tr. 148, 149, Officer Spencer states that the did not see the face of the person who abandoned the driver's seat at 12th and Constitution. He also states that the driver of the chased automobile and Officer Dorsey jumped out of their respective automobiles almost simultaneously, in contradiction, again, to Officer Spencer's testimony that there was a 60 to 90 yards (later, feet) to travel before getting to the point of the abandoned car.

While we do not rely on the testimonial inconsistencies as such as making out a case of inherent incredibility, we suggest that they do add support thereto.

What we do rely on is the fact that one just cannot see from the inside of one sedan into the inside of a second sedan in front of the first in the nighttime well enough to identify the fact of a momentarily turned head in the second sedan to the distinction of all other faces thereafter.

This court has had occasion to comment on the inherent frailty of nighttime identifications. In Smith v. United States, 118 U.S. App. D.C. 235, 335 F.2d 270 (1964), it was stated, at 275, 276:

> "But in this case the evidence on counts two and three was not overwhelming: it consisted of a nighttime identification made from a distance of twenty-five feet,. . ."

Here, there are added the circumstances of a view into an enclosed automobile, motion, turning, angles, and moving shadows resulting from a rotating colored light; with the distance, though never made precise, at least the length of an automobile plus 2 to 10 feet.

We do not suggest that Officers Dorsey and Spencer consciously lied. We presume that these officers believed from all the circumstances that appellant was in the stolen car during the course of the chase. Acting upon this belief, Officer Dorsey arrested appellant on the spot without warrant although by his own testimony he had no reason to believe that the car was stolen at that time. The conviction that this was the fellow driving the car and jumping from the driver's

seat grew naturally thereafter in the minds of the officers.[3/]

Physical circumstances dictate against that conviction, however, and:

> ". . . the probability of error is too great to tolerate." Jackson v. United States, supra, at 865.

In this regard, detractors of judicial decisions which set high standards consistent with the protection of civil liberties are fond of urging that criminal elements are aware of those standards and somehow use them in furtherance of their criminal activity. We urge, conversely, that the law enforcement community is well aware of areas where high standards of proof are necessary to the making out of a crime, i.e., being

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3/ "One reason for [close scrutinization of warrantless arrests] may well be the possibility that officers will fabricate evidence after the arrest to justify their acts, and the difficulty of proving such fabrication." Jackson v. United States, supra, Note 15 at 868.

a passenger in a stolen automobile. See Kemp and Stevens, supra. We submit that these circumstances present a strong temptation for the police to nominate the person apprehended as the driver and the person who got away as the passenger.

For these reasons, we submit that if the face-sight identification during the automobile chase is found to be inherently incredible, then the continuous-sight identification during the foot chase, too, must fail as an integral part of a discredited whole effort to nail down the identification.

Appellant would further point out that the jury's conclusions are not so inconsistent with appellant's position as would first appear. On the contrary, notwithstanding the policy officers' testimony that they saw the stolen car coming from the direction of Maryland and observed appellant behind the wheel, the jury found the appellant not guilty of interstate transportation of the stolen vehicle. From this not guilty finding by the jury, it would seem reasonable to draw the inference that the jury suspected somebody else stole it, and - contrary to the officers' testimony -

that somebody else was driving it.[4/] Without the benefit of instructions concerning the standard of proof necessary to find a passenger guilty of unauthorized use of a motor vehicle, the jury may well have concluded the appellant was a passenger, and, so uninstructed, concluded appellant being in the car was accordingly "guilty".

In concluding this point, we would respectfully direct the court's attention to one more statement made by Officer Spencer in the course of cross-examination. Appellant's trial counsel, again trying to demonstrate the incredibility of the face-sight identification, asked:

4/ In this regard, the jury may well have been impressed by the fact that, while it was the middle of the summer and there was no evidence appellant had gloves, and while there was testimony by the officers that there were fingerprints taken from the car, no fingerprint evidence was introduced.

"Q Well, sir, he didn't turn and look at you and study your face?

"A No, I doubt if he could see my face." (Tr. 145)

We suggest that Officer Spencer's "doubt" was an eminently reasonable one drawn from his human experience. We further suggest that Officer Spencer's testimony that he not only could see at that same point in time the opposite face, but thereafter could identify it to the distinction of all other faces, must perforce raise a doubt based upon this court's human experience of sufficient magnitude to hold Officer Spencer's and Officer Dorsey's face-sight identification inherently incredible.

In so doing, we urge that this court find that the trial court erred in failing to grant the motion for acquittal, and reverse and remand with instructions to enter such judgment of acquittal.

II.

THE TRIAL COURT ERRED IN FAILING TO ALLOW THE DEFENSE TO CALL ONE TAYLOR FOR IDENTIFICATION PURPOSES, AS THE MAN WHOM THE DEFENSE ALLEGED WAS THE ACTUAL PERPETRATOR OF THE CRIME, ON THE BASIS OF TAYLOR'S RIGHT AGAINST SELF-INCRIMINATION

With respect to Point II, appellant desires the court to read the following pages of the reporter's transcript: 188-195; 258-262; 265-270; 282-283; 443-445, all inclusive.

Just after the trial court denied appellant's motion for acquittal, and just prior to appellant's opening statement, a colloquy took place concerning the availability of one William Taylor as a witness for the defense. It was appellant's trial counsel's intention to put Taylor on the stand to ask him to identify himself. Appellant's defense was to be based in part on the contention that Taylor was the person who had stolen the automobile and who had been chased by Officer Dorsey.

After outside counsel had been appointed to protest Taylor's interests, it developed that Taylor was at that time charged with unauthorized use of a vehicle -

though another vehicle - occurring very close in time to the matters at issue; that he knew appellant; and that he felt, for his own good, that he, at that time, would like to claim his privilege against self-incrimination.

Thereafter, the court ruled that it would call Taylor outside the presence of the jury to determine if Taylor invoked his privilege and invoked it properly. If he did so, the court ruled, Taylor would not be allowed to testify before the jury. In light of the court's ruling, appellant's trial counsel determined that there was no reason to call Taylor.

We submit that the court's ruling constituted reversible error in that it wrongfully deprived appellant of a substantial element of his case.

If nothing else, the calling and identification would have shown that there was in fact a William Taylor. The showing in and of itself to the jury that Taylor was not a figment of appellant's imagination and that appellant did not fear to produce Taylor in open court would have contributed positively to appellant's defense. Moreover, as developed below, it would have given the jury the opportunity, in light of the

nighttime identification of appellant by the police officers, to measure for themselves the possibilities of mistaken identification.

In Namet v. United States, 373 U.S. 179 (1963), it was stated, at 188, concerning witnesses who claimed the privilege and who were called by the Government:

> "They could, and did, testify that they knew the petitioner. . .The Government had a right to put this evidence before the jury."

We submit that Taylor had no right to refuse to take the stand before the jury, and the trial court could not create such a right to the detriment of appellant's defense. [5]

5/ See Judge McGowan's separate opinion filed in Woody v. United States, ____U.S. App. D.C.____, ____F.2d_____, No. 17965, Opinions filed August 11, 1966, where he found that a witness' refusal to answer questions - much less not take the stand - on the ground of self-incrimination when called as a witness for the defense was, in the circumstances there, a factor in determining whether Woody's ability to defend himself had been prejudiced.

> "The error made arises from confusing the privilege of any witness not to give incriminating answers with the right of the accused not to take the stand in a criminal prosecution against him." United States v. Housing Foundation of America, 176 F.2d 665, 3 Cir. 1949, at 666. 6/

. . . .

Contributing, no doubt, to the court's determination in ruling against Taylor's being put on the stand before the jury was the prosecutor's twice-made representation that he would:

> "not argue a missing witness argument in regards to the defendant (sic) Taylor." (Tr. 267; and see Tr. 192.)

Moreover, the trial court indicated (Tr. 192) that his feeling then would be to deny any missing witness claim by the prosecutor. However, during the course of his rebuttal argument, the prosecutor stated:

> "There is no indication here that Taylor looked like the defendant." (Tr. 443)

6/ See Billeci v. United States, 87 U.S. App. D.C. 274, 184 F.2d 394 (1950). See also Coile v. United States, 100 F.2d 806, 5 Cir. 1939; Shushan v. United States, 117 F.2d 110, 5 Cir. 1941.

Appellant's counsel immediately took issue, but when a three-way conversation between the trial court, the prosecutor and appellant's trial counsel, with the trial court supporting the prosecutor's recollections before the jury developed, 7/ trial counsel perhaps prudently dropped the subject.

7/ Actually, the trial court's and the prosecutor's recollection concerning appellant's testimony on stature and complexion is equivocal at best. The actual testimony, at Tr. 282, 283, is as follows:

"Q All right. Now, is Taylor bigger than you or smaller than you?
"A The same size I am.
"Q And is he heavier than you or lighter than you?
"A Lighter than I am. He may be heavier, but he looks lighter than I am.
"Q He is thinner?
"A Uh huh.
"Q And is he light-skinned or dark-skinned?
"A Brown skin.
"Q Light or dark?
"A Just brown skin.
"Q Is he lighter than you?
"A He is lighter than I am."

In any event, as inordinately determined as the police officers were in their identifications, the officers never claimed to have been able to discern shades of skin pigmentation; and specifically disclaimed identification by physical stature (Tr. 48).

Arguing "no evidence of similarity" and arguing "missing witness" is, we submit, a distinction without a difference. Put another way, the prosecutor could not have argued that there was no evidence of similarity of physical characteristics but for the fact that appellant was denied the opportunity to put Taylor on the stand for the jury to see. The jury could only conclude from these statements that one of the reasons Taylor was not called was appellant did not wish the jury to make a physical comparison. Nothing, of course, could have been further from the real cause of Taylor's failure to take the stand; the trial court's refusal to allow him to testify.

We accordingly submit that the trial counsel's allowing the prosecutor to argue over appellant's objection "no evidence" that appellant and Taylor resembled each other compounded the error of failing to allow appellant to put Taylor on the stand for the jury to observe.

For these reasons, individually and collectively, the decision should be reversed.

CONCLUSION

For these reasons stated, appellant prays that this court reverse the conviction and judgment here under review:

1. With instructions to enter a judgment of acquittal, or;

2. Such other relief that this court may deem appropriate in the premises.

Respectfully submitted,

Edward M. Shea
(By appointment of this court)

RAGAN & MASON
900 - 17th Street, N. W.
Washington, D. C.
August 31, 1966

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing Brief for Appellant on the office of the United States Attorney for the District of Columbia by hand delivery.

Edward M. Shea

August 31, 1966

11/15/66
MFT
930 am

WILBUR K. MILLER

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,344

LARRY C. CLEMONS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Edward M. Shea
Attorney for Appellant
(By appointment of this Court)

ARGUMENT

Introduction

The United States has substantially followed the form of Brief For Appellant with regard to the two questions presented. Accordingly, we again follow that same outline; making two points regarding the United States' position with regard to Question I, and three points with respect to the government's position on Question II.

I.

MOTION FOR ACQUITTAL AND EVIDENCE AS INHERENTLY INCREDIBLE

A. Motion for Acquittal

The government contends that appellant waived his right to contest the denial of his motion for acquittal at the end of the government's case. The basis for the government's contention is that appellant's situation is not within the rule of Cephus v. United States, 117 U.S. App. D.C. 15, 324 F.2d 893 (1963) where the defendant had introduced evidence in his own behalf to rebut his

co-defendant's testimony after the motion for acquittal had been denied.

First, we respectfully suggest that this Court overrule in its entirety this doctrine of waiver as inconsistent with Rule 29(a) of the Federal Rules of Criminal Procedure, for the reasons stated in Cephus.

Alternately, we submit that the rule in Cephus should be enlarged at least to include the situation where, as here, one of the reasons the defendant puts in evidence after the denial of his motion for acquittal is because a potential witness for the defendant invokes his, the witness', privilege against self-incrimination. Surely the need to respond to "the testimony of one who has an incentive to exculpate himself by inculpating his fellow defendant" (Id. at 20, 898), is no more urgent than the need to fill the vacuum of silence on the part of one who has an incentive to exculpate himself by invoking his privilege against self-incrimination.

B. Inherent Incredibility

As evidenced by the cases cited by it, it is apparent that the government misconstrues the basis of

our proposition that the trial court erred in allowing the jury to consider as evidence the testimony of Officers Dorsey and Spencer that they made a face-sight identification of appellant in the course of an automobile chase.

In none of the cases cited by the government was the subject matter of the testimony challenged as being inherently, physically impossible. Indeed, the holding in Young v. United States, 114 U.S. App. D.C. 42, 309 F.2d 662 (1962), was that even though the testimony might be considered "implausible, unreliable, or incredible," it was "possible, even if not necessarily plausible,".

In the other cases footnoted, the contested identifications were attacked as mistaken in the context of (1) direct contact in a streetcar,[1/] (2) walking sandwiched between two robbers, a mask fell from his

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1/ Wigfall v. United States, 97 U.S. App. D.C. 252, 230 F.2d 220 (1956).

face as the foremost robber turned to speak about following too closely,[2] and (3) snatching from the pocket of the witness in the men's room of a restaurant.[3] No factual situation is presented in Billeci v. United States, 87 U.S. App. D.C. 274, 184 F.2d 394 (1950).

In those situations, the question was whether or not the person making the identification had made a mistake in a situation where it was physically possible to make an identification. We agree that this is a jury question.

Here, we urge, the question of mistake is never reached because the physical circumstances and environment in which the alleged sightings were testified to were of such a nature as to make face-sight identification physically impossible; and, accordingly, inherently incredible. This, we urge, is a matter for the Court to determine.

2/ Jones v. United States, ____U.S. App. D.C. ____, 361 F.2d 537 (1966).

3/ Thompson v. United States, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951).

II.

EXTENSION OF WITNESS' PRIVILEGE AGAINST SELF-INCRIMINATION

The government concedes that the trial court refused to allow appellant to put one William Taylor on the stand. The government does not allege that Taylor had no relevant or material testimony to give; but, says the government:

A. Because appellant did not properly preserve his objection, this Court is not obliged to consider the point on appeal.

B. Because the government would be unable to cross-examine Taylor, the trial court was correct in ruling that appellant could not call Taylor to the stand before the jury.

C. By footnote, that because there was, in the government's opinion, no missing witness issue at all, the prosecutor's argument that there was no indication that Taylor looked like the defendant has no relation to the refusal to allow Taylor to be called as a witness.

These three contentions are next considered.

A. Preservation of the Issue

The government, stating that "appellant made no objection to the ruling at the time," goes on to cite cases where defendants were found to have failed properly to object to government witnesses' testimony for the proposition that this Court is not now obliged to consider the question. We urge that the rule in those cases cited has no application here.

It was appellant, not the government, who sought to place Taylor on the stand. The government objected, and the trial court determined to delay ruling on the matter until he appointed counsel for Taylor and heard the positions of all concerned. Appellant's trial counsel stated his position clearly and correctly:

> "It was my understanding that he [Taylor] could be compelled to take the stand, but he could not be compelled to testify against himself. My only thought was to produce Taylor and to ask him his name and no further questions." (Tr. 191)

The trial court heard argument opposing appellant's position by both the government and appointed counsel for Taylor, and ruled against appellant.

In this context, we submit that a further formal exception by appellant's trial counsel was neither necessary nor warranted.

Rule 51 of the Federal Rules of Criminal Procedure substantially provides in part that exceptions are unnecessary; that at the time the ruling is sought, the seeker need only make known to the court the action he desires the court to take. Appellant's trial counsel not only complied with this requirement by asking the Court to allow Taylor to take the stand, but also stated the evidentiary bases for this request. Those were, first, the desire to avoid a missing-witness argument, and, later when the request was opposed, the correct belief that Taylor had no right not to take the stand.

In Keen v. Overseas Tankship Corp., 194 F.2d 515 (2dCir. 1952), it was stated, at 519:

> "After the plaintiff had labored for some time amid constant interruption to examine a witness, named Moore, the judge excused the jury and he and the two lawyers discussed the issue of Mruczinski's

insanity. At the end of this talk the judge made it entirely clear that he did not think that Mruczinski's temperamental unfitness for his duty was a ground of liability unless it had come to the defendant's knowledge. His position was made plain at the conclusion of the colloquy, as appears in the appended addendum. It is indeed true that the plaintiff did not except to that ruling, any more than to the charge; but he had made his point clearly; the judge had overruled him; the defendant's attorney had said that the judge had anticipated the objection he himself was about to make; and these circumstances satisfied Rule 46, Fed.Rules Civ. Proc. 28 U.S.C.A. which preserves a point, if 'a party * * * makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor'."

The Notes of Advisory Committee on Rules state just below Rule 51 of the Federal Rules of Criminal Procedure that:

> "This rule is practically identical with rule 46 of the Federal Rules of Civil Procedure. It relates to a matter of trial practice which should be the same in civil and criminal cases in the interest of avoiding confusion."

In sum, then, we submit that the ruling was properly preserved for review upon appeal. Accordingly, this Court need not find plain error effecting substantial rights to review the merits of the ruling in its evidentiary setting.

B. Merits of the Ruling

Our reading of the transcript gives us to believe that the trial court's ruling was based on an excess of concern for the rights of Taylor. However, the government says the ruling was correct because the government could not have called Taylor as its witness in a parallel situation, and because the government would not have been able to cross-examine Taylor in the instant situation.

We assert that none of these reasons is a meritorious basis for the ruling.

For the reasons stated in appellant's brief, appellant asserts that the well established rule is that a witness must take the stand, having only the right to refuse to answer specific questions.

The government says that since Taylor could not be cross-examined by the government, it follows that appellant could not call him.

We submit that this does not follow for two reasons.

First, appellant's announced purpose was only to ask Taylor his name and let the jury see him. The government could have cross-examined Taylor on these limited points; even to determine, if it desired to, whether Taylor's physical appearance had changed since the date of the crime. The limited purpose for calling Taylor makes inapplicable Douglas v. Alabama, 380 U.S. 415 (1965) and like cases cited by the government where the prosecution used the device of asking the witness a series of questions to get substantial, and otherwise inadmissible, information before the jury.

This "sauce for the goose, sauce for the gander" argument by the government is unsound for a second reason. Equality for the prosecution and defense in all aspects of criminal procedure is not necessarily desirable, appropriate, or even - statutorily or constitutionally - the law.

As examples, the government has a right in narcotics cases to require a co-conspirator to testify by the simple expedient of immunizing him from prosecution. 18 U.S.C. 1406. The defendant has no corresponding right. On the other hand, the defendant has his constitutional rights; among them, his 6th Amendment right to have compulsory process for obtaining witnesses in his favor.

In this regard, we further submit that the frustration of this right by refusing to allow to be put on the stand a witness called in appellant's behalf was plain error effecting a substantial - constitutional - right.[4/]

The error was plain because the law is clear; not only by reference to the cases cited in appellant's brief, but also as evidenced by footnote language in

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4/ While we fear that the constitutional reason the ruling was erroneous was not adequately preserved and must therefore meet the standard of Rule 52(b) of the Federal Rules of Criminal Procedure, we urge that the ruling, in its evidentiary context, was properly preserved for the reasons stated in II.A. above.

Cephus v. United States, supra, cited by the government:

> "22. The Government may, in such cases, indict defendants separately or move for severance upon trial. See United States v. Dioguardi, 20 F.R.D. 10, 13 (S.D.N.Y.1956), and cases cited. With only one of the accused on trial, the prosecution could call the other as its witness. Cf. United States v. Augustine, 189 F.2d 587, 588-589 (3d Cir. 1951); United States v. Hiss, 185 F.2d 822, 831-832 (2d Cir. 1950). And see United States v. Maloney, 262 F.2d 535 (2d Cir.1959). The witness would retain his privilege against self-incrimination as to specific questions." (Emphasis added).

There can be no doubt that a right deemed worthy of inclusion in the Constitution can be nothing less than "substantial." The right was certainly "effected" since the result of the ruling was that Taylor did not take the stand.

Finally, the error was by no standard "harmless."

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. * * * But if one cannot say, with fair assurance, after

> pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."
> Kotteakos v. United States, 328 U.S. 750, 764-765 (1946) as cited in Oliver v. United States, 118 U.S. App. D.C. 302, 335 F.2d 724 (1964).

C. Argument of the Prosecutor

By its ultimate footnote, the government argues that there was, in its opinion, no missing witness issue at all. Accordingly, goes the government's argument, there is no connection between the prosecutor's statement that "there is no indication here that Taylor looked like the defendant" and Taylor's not taking the stand.

We urge that there could not be a clearer connection. But for Taylor's not being put on the stand, the prosecutor could not have so argued. Otherwise, we

rely on the reasons stated in appellant's brief for the proposition that the prosecutor's remarks added to the prejudice resulting from the ruling.

In conclusion, a portion of the last sentence in that ultimate footnote points up the untenable position a defendant in a criminal case shall find himself should this Court hold that a given defendant may not at the very least call to the stand and identify as part of his defense the person whom the defendant contends committed the crime.

That portion of the sentence reads, ". . .he surely could have brought other witnesses to testify that he looked like Taylor,". We submit that such indirect evidence would at best be given little or no weight by the jury, and at worst would raise negative influences in the minds of the jury. This artificial procedure upon which the defendant would have to rely in defending on the proposition that another in fact committed the crime demonstrates that the rule here

sought by the government would substantially enervate defendants' constitutional rights to compulsory process for obtaining witnesses in their favor.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court be reversed.

Edward M. Shea
(By appointment of this Court)

RAGAN & MASON
900 - 17th Street, N. W.
Washington, D. C.

October 21, 1966

Certificate of Service

I certify that I have this day served a copy of the foregoing Reply Brief for appellant on the Office of the United States Attorney for the District of Columbia by hand delivery.

Edward M. Shea

October 21, 1966